FILED
FEB 10 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 665

WOODMAR REALTY COMPANY, a Corporation, Debtor,

Petitioner,

vs.

WALTER A. McLEAN, Trustee, and HERSCHEL B. DAVIS, Trustee's Attorney,

Respondents.

* * * * *

In the Matter of the WOODMAR REALTY COMPANY, a Corporation, Debtor. } **In Proceedings for the Reorganization of a Corporation.**

On Petition For Writ Of Certiorari To The United States Circuit Court of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION.

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BRIEF OF RESPONDENTS IN OPPOSITION.

OPINIONS.

The opinions of the court below are correctly set forth in the petition.

JURISDICTION.

The jurisdiction requisitions are adequately set forth in the petition.

QUESTIONS PRESENTED FOR REVIEW.

The petitioner sets forth three questions presented for review. Actually there are only two questions. Questions 1 and 2 simply charge error in the ruling of the lower court in sustaining the motion to dismiss and in the ruling of the Court of Appeals in affirming this order. The question covering these two proposed points by the petitioner is simply this:

> "1. Did the Court of Appeals commit error in affirming the ruling of the District Court sustaining the Motion to Dismiss the Amended Petition to remove the court appointed trustee and trustee's attorney?".

Under question 3 the petitioner challenges the authority of the District Court to dismiss the debtor's removal petition without a hearing on the merits, as alleged punishment for contempt of one of the three lawyers who signed the petition. This question is not raised by the record which shows clearly that the petition was thoroughly examined and analyzed in both the District Court and Court of Appeals and was found wholly wanting in specific allegations charging fraud and misconduct. After deciding this point, on the merits, the court went on to point out that the petition was not filed in good faith and constituted a near contemptuous abuse of the processes of the Federal Court. In other words this question is:

"2. Where the court examines a petition which contains scandalous and unfounded charges of fraud, may it, after holding that by and large, the charges are not specific, and where specific they are refuted by record, go on and point out that the filing of the petition constitutes near contempt of court?"

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The pertinent provisions of the constitution and statutes and rules are adequately set forth in the petition at pages 5-7, except that the rule under which the motion for dismissal was authorized was not set forth. This rule reads as follows:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted.'
>
> Rule 12(b) F.R.C.P.

CONCISE STATEMENT OF THE CASE.

This litigation involves the bankruptcy of a corporation engaged in the real estate development business in Hammond, Indiana. Originally, an involuntary petition, under Chapter X of the Bankruptcy Act, was filed in January, 1941. Practically all of the assets of the corporation consisted of 1540 contiguous parcels of real estate. Each of these parcels was encumbered by one or more special improvement liens arising out of the construction of streets, sewers, sidewalks, etc., for the improvement of said properties.

The amount of the liens on each lot is recorded in the Lake County Treasurer's record, a public record of which the Trustee must take notice.

When the Trustee took over the various lots of the bankrupt and sold them he took them subject to the public records in the Lake County Treasurer's office which showed the amount of the liens unpaid on each lot in question. Upon converting these lots to cash, he held the funds in trust for the benefit of the holders of these liens—whoever they might be.

All of the property owned by the petitioner corporation was sold prior to December 31, 1950, and by the former trustee, Charles L. Surprise, who was in office during that period. In each instance, except two, the sales were made free and clear of liens and the liens ordered transferred to attach to the proceeds of the sales. A number of the properties were sold to a corporation known as Home Builders, Inc., which it was alleged in a hearing before the Trial Judge Luther Swygert, was a subsidiary of the

sales agent, S. C. Ennis and Company; two were sold to Donald Gardner and A. Zilkey, members of the bondholders protective committee, and these facts were also brought to the attention of Judge Swygert. Each of these sales was approved and on the sales handled by S. C. Ennis and Company the court allowed the commissions. At no time since the present trustee has been in office has there been any petition filed by the bankrupt asking to have these orders set aside. In the course of the proceedings on three separate occasions the corporation was held to be insolvent. After lengthy hearings in 1951 and 1952, the matter was, early in 1953, put in straight bankruptcy. All of the assets of the corporation had by then been reduced to cash and there is at present $457,000.00 cash on hand which constitutes all of the assets of the estate. There were at that time liens of record against the property of the bankrupt of about $470,000.00.

The Petition to Remove was originally filed in June of 1957. The record shows that this petition was filed as a warning to respondents not to interfere with petitioner's counsel. This petition was filed 'on the eve of commencement of litigation upon appellant's objections to Class 2 claims, that it was withdrawn shortly after the order of the court which neutralized the trustee and his counsel insofar as the trial of the test case was concerned.' (opinion of Court of Appeals—Petitioner's Appendix, p. 22a). A new petition to remove was filed in June of 1958 after Judge Robert E. Tehan, who was then sitting as trial judge, ordered the petitioner's attorney to refrain from charging fraud and misconduct unless he was willing to file a verified petition charging the same. When the matter came on for hearing the trial judge ordered the petition particularized in keeping with Rule 9(b) stating that

in the interest of time, he was entitled to have compliance with the rule to the end that he might be apprised as to the basis of fraud and misconduct. The amended petition in question was filed about six months later. A motion to dismiss this amended petition was filed by the respondents on the ground that it failed to state facts sufficient to grant grounds of removal. This motion was sustained.

In this opinion the District Court Judge carefully discusses the allegations of the petitioner's amended petition for the removal of the Trustee and his attorney and points out that the amended petition does not allege fraud with particularity, as required by Rule 9(b), Federal Rules of Civil Procedure.

The trial court's opinion likewise reviews the conduct of the petitioner's attorneys over the years of the pendency of this proceedings, and the District Court Judge then finds that in his opinion the amended petition for removal was not filed in good faith.

The ruling of Judge Tehan sustaining the motion to dismiss did not state whether or not the dismissal was 'with prejudice' and no attempt was made by the petitioner to file an amendment to the petition dismissed or to file another amended petition. The petitioner stood on the ruling and took his appeal.

The Court of Appeals of the Seventh Circuit sustained the ruling of the lower court stating that the petition was wanting in sufficient allegations of fact to charge any acts of fraud. (See Petitioner's App., p. 7a). In the course of its opinion and after so finding, the Court of Appeals went on to point out, that from the facts disclosed, the petition was not filed in good faith. This petition for Writ of Certiorari follows.

ARGUMENT.

Introduction.

At the outset, we would call attention to the fact that much of Petitioner's Statement of Facts and Argument is devoted to the fact that this matter has been pending for over twenty years. In connection with this we would show:

1. Walter A. McLean was appointed Trustee in December, 1952 in corporate reorganization proceedings of the Woodmar Realty Company. In February, 1953, Woodmar Realty Company was placed in straight bankruptcy and Walter A. McLean was again appointed Trustee and Herschel B. Davis was named as his attorney. By September 1955 this involved matter was ready for final disposition and at that time the Trustee filed his Trustee's Final Report recommending allowance of the lien claims described therein and asked authority for their payment. Petitioners, the bankrupt, then appeared and filed objections to virtually all of the claims involved and its right to so object was then sustained by the Circuit Court of Appeals on appeal (*In re: Woodmar Realty Company*, CCA 7th Cir., 1957, 241 Fed. 2d 768). Thereafter, one claim; to-wit, Claim 441, was selected as a test claim to be tried to determine the validity of all of the bankrupt's objections to all lien claims. Trial was had on Claim 441 and on July 21, 1961, the District Court found against the petitioner herein on all of its objections to such claim, in effect holding that the petitioner's objections to all lien claims were without merit.

Had the petitioner herein not filed objections to all of the lien claims in 1955, the Trustee's Final Report which alleged that the bankrupt's objections to lien claims were invalid would then have been presented and this matter would then have been completely disposed of and this bankruptcy then closed.

2. We do not undertake to speak for the trial court and the Court of Appeals on the wild charges of delay but would point out that the delay was probably in its entirety due to reckless disregard of the petitioner for brevity and materiality in the pleadings he filed. The Amended Petition to Remove the Trustee herein in question is an example—46 printed pages in length and a Bill of Particulars of 100 pages. *Literally hundreds of petitions and motions have been filed by the petitioner within the last four years in this cause.* The petitioner filed a proposed special finding in the test case—Claim 441—85 pages in length. Incidentally petitioner states on page 20 of his petition that no appealable order has yet been entered on Claim 441. This is not true; Cause No. 13579, Court of Appeals 7th, is his appeal on this matter.

Six appeals have been taken by petitioner and nine petitions for Writ of Mandate filed against Judge Tehan. Delay there has been, but all brought about by petitioner himself.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

Motion to dismiss must be sustained when there are only general allegations of fraud or the specific allegations are in conflict with the record.

The issue in the present case is simply this—Did the trial court err in holding that the Amended Petition to Remove the Trustee and his Attorney, 46 pages in length and buttressed by a Bill of Particulars of 100 pages in length, state facts sufficient to require the removal of the respondents from their respective offices?

The question of the sufficiency of the petition was raised by the filing of motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b) F.R.C.P.

Respondents urged that general allegations of fraud as were made in the petition herein against the respondents are not, under Rule 9(b) F.R.C.P., sufficient to withstand a motion for dismissal.

> "Allegations were made that leases had been acquired through 'gross misrepresentation and deceit' a fraud upon this court, and that the decree in New Mexico was brought about by the misrepresentation and deceit perpetrated by Ellis on the New Mexico court.'
>
> "The form of this allegation is wholly insufficient under Rule 9(b), which requires that all averments of fraud or mistake should be stated with particularity. We have here only a categorical assertion of fraud. Such an assertion of fraud amounts only to conclusion, which is not admitted on a motion to dismiss the present complaint."

Ruben v. *Ellis*, (CCA 5th Cir., 1953) 202 Fed. (2d) 415, 417.

In a similar case, the court stated:

> "The plaintiff avers a vicious conspiracy and collaboration between the defendants to prevent his collection of rentals; however, no factual allegation is made in support thereof. This allegation is much too vague and general and must fall since it is unsubstantiated by any facts disclosed in the pleadings."
>
> *Conner* v. *Real Title Corporation,* (CCA, 4th Cir., 1947) 165 Fed. (2d) 291, 294.

In keeping with the above rule, the motion to dismiss was, by the District Court, sustained with the following observation:

> "It clearly appears from what we believe to be a painstaking review, that the amended petition to remove trustee and trustee's attorney and to restore Woodmar to possession, fails to state facts warranting the removal of trustee and his attorney."
>
> Judge Tehan's Opinion, Appellants' App. Cause No. 13215, Court of Appeals, Pages 276 and 277.

After the District Court sustained this motion, which in effect admitted all facts pleaded (except general allegations of fraud and such allegations as were contradicted by the record in the case) the petitioner did not seek to file an amendment or another amended petition but appealed to the Court of Appeals on the order of dismissal rendered. The dismissal was silent as to whether or not it was "with prejudice", but the petitioner, within a certain time limit, and in lieu of an appeal, certainly had a right to file an amended petition charging new and different grounds, a right to which he did not avail himself (Moore—Federal Practice Vol. 3, pp. 838, 839).

When the court, after careful analysis of the removal petition, sustained the Motion to Dismiss, it in effect said: "Assuming that all you say is true, there is still

no ground for removing the respondents." Does petitioner contend that the court should take up its time to grant him an opportunity to prove facts which are admitted?

Instead of tendering amended petition the bankrupt appealed, and the Court of Appeals affirmed the decision of the District Court with the following observation:

> "We have reviewed the record and the amended petition carefully and are convinced that the petition is so wanting in sufficient allegations of fact as to present not even token compliance with the provisions of Rule 9(b) which require a pleader averring fraud to state 'with particularity' the circumstances alleged to constitute fraud."
>
> Petitioner's Appendix, page 7a.

The court thereafter carefully analyzed the petition and concluded:

> "If the amended petition has any factual basis whatsoever, it tends to state a charge not against appellees, but only a renewal of charges made at least as early as November, 1952, against the prior trustee, Charles L. Surprise, and other persons. Thus it is alleged that Surprise, and others, conspired to perpetrate a fraud upon the Court and appellant in order to obtain the initial finding of appellant's insolvency, to have themselves appointed as fiduciaries having control of appellant's property and thereafter to dispose of and distribute appellant's property to Class 2 claimants to their own benefit and profit.
>
> "The amended petition contains not a single allegation connecting either of the appellees with the alleged conspiracy and fraudulent conduct of those persons, except for the recited fact that appellee Davis was appointed by the court as co-counsel for Surprise in May, 1950, and served Surprise in that capacity until hearings were commenced in 1951, which ultimately led to the removal of Surprise as trustee. Upon that record fact hangs the tenuous allegation

that Mr. Davis became tainted by the alleged fraud of Surprise through that representation and that appellee McLean became likewise tainted through his association with Mr. Davis after Mr. McLean was appointed successor trustee.

"In his opinion dismissing the amended petition, Judge Tehan correctly and accurately concluded that such allegations were an 'obvious attempt to establish guilt by association', and that the allegations were refuted by facts found and adjudicated in this case. We approve those conclusions without reservation, and resort to the resume of the procedural history of the case which follows only because we think it necessary to document the evident fact of gross bad faith which characterizes these allegations."

Petitioner's Appendix, pages 13a and 14a.

The court then examined the record before in light of the amended petition and concluded:

"Further specific analysis of statements contained in the removal petition could serve no purpose. We find nothing of substance in any factual averment, but a wealth of conclusionary statements which lead invariably to counsel's vitriolic conclusions that appellees, who dare to oppose him, are guilty of heinous misdeeds."

Petitioner's Appendix, pages 26a-27a.

Clearly the court considered, and considered carefully, the amended petition and based its decision on the insufficiency of the same, not on the contemptuous conduct of petitioner.

Was there any charge that respondents were guilty of 'serving two masters'?

Lest there be any misconceptions that the Amended Removal Petition charged the trustee or his attorney with being in the employ of or a representative of any of the claimants herein as is apparently charged on pages 23

and 24 of his brief, we state unequivocally that there is no such charge contained in the Removal Petition. The thing he is complaining about is that the trustee has taken the position that he is the representative of all creditors, the secured as well as the unsecured, and it is his duty to recognize and recommend for payment claims which according to the public records and all known facts are valid and subsisting. The petitioner, on the other hand, claims that the owner of each bond and coupon must prove up in an adversary proceeding his liens and trace the funds available to his bond and coupon, thus imposing upon the claimants great labor and expense and eventually force them into a "poor settlement" rather than expensive litigation. The Court of Appeals sustained the trustee in his position in this language:

> "• • • a trustee in bankruptcy represents every class of creditors of the bankrupt. He takes the same property rights which the bankrupt owned and he is charged with a duty to discover and honor recorded liens upon the property in his hands. *In re Wakely*, 7. Cir., 11 F. 2d 802, and he may be held personally liable for his negligence if he disposes of property in his hands without discovering the record fact of the existence of a valid lien upon that property. *In re Prather*, S. D. Ill., 138 F. Supp. 433; *Grodsky v. Sipe*, E. D. Ill., 136 F. Supp. 244."

Petitioner's Appendix, pages 24a and 25a.

Petitioner takes the position that trustee must object to every claim and failure to do so puts him in violation of the dual capacity doctrine mentioned in *Woods v. City National Bank & Trust Co.*, (1941) 312 U.S. 262. In view of the above quotation this does not follow. On these facts the decision of the District Court was manifestly correct.

II.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

Furthermore, it clearly appears that there is no important question of Federal Law requiring decision by this court. The question is particularly unimportant because under the Bankruptcy Act, Chapter X, sec. 160 (11 U.S.C.A. 560) "* * * the Judge at any time, without or upon cause shown, may * * * remove trustees and appoint substitute trustees."

Chapter II, sec. 2(a) (17) (11 U.S.C.A. sec. 2(a) (17)) of the Bankruptcy Act gives District Courts jurisdiction to "* * * upon their own motion, remove for cause receivers or trustees, upon hearing after notice; * * *"

Clearly it appears, therefore, how insignificant and unimportant is the ruling in this particular case since the law specifically states that the court may at any time remove trustees on its own motion and apparently for any cause that satisfies the court. Certainly if the trustee at any time proved faithless to his trust he could be summarily removed by the District Court, and the ruling on this petition would be no bar to such action.

III.

THERE IS NO CONFLICT OF DECISIONS.

The petitioner, on page 27 of his brief, charges that the ruling herein, dismissing the petition to remove is in conflict with the rule of the other circuits. As was hereinbefore pointed out the order was silent as to whether or not the dismissal was "with prejudice" and under the holding of the authorities cited in Moore's Federal Practice, 2nd Ed., Volume 3, page 839, there was a clear right to file an amended petition of which right he did not avail himself but chose rather to stand on the ruling and take

an appeal therefrom. Furthermore, as is provided in the Bankruptcy Act the court, of its own motion and without cause, could remove the trustee at any time.

Assuming, however, for the purpose of argument, that the order of the dismissal herein was with prejudice, the cases cited by the petitioner are not in conflict with the ruling of the Circuit Court herein. The petitioner cites cases from the Second and Fifth Circuits in support of his contention.

In the case of *Kohler* v. *Jacobs*, 138 F. 2d 440 (CCA 5, 1943) the court held on page 443 that the charge of fraud was alleged with sufficient particularity stating:

> "One has to search in these pleadings for particulars but they can be found."

In the case cited from the 2nd Circuit, *Levinson* v. *B. & M. Furniture Co.*, (CCA 2, 1941) 120 F. 2d 1009, the Court of Appeals held that the ruling of the trial court in refusing to dismiss a proof of claim was proper, stated that: "although the claim did not allege the fraud with as much particularity as desirable • • • since its general purport is plain enough the court below did not err."

In both of the Circuit Court cases it appears therefore that the pleading met the requirements of Rule 9(b), as interpreted below.

It is interesting to note that in one of the other cases cited by appellant in support of his contention of conflict, the court held that where, after ordering a bill of particulars, it appears that the claimant "can not put in plain, and precise terms the exact fraud that he is talking about, a motion to dismiss would be entertained." *U. S.* v. *Atlantic Pacific Iron Works*, (DC-ED N. Y. 1944) 53 F. Supp. 268, 272.

It follows therefore that there is no conflict with the ruling in the other circuits.

IV.

NO ESTABLISHED PRECEDENT WAS VIOLATED

The petitioner charges that the District Court violated established precedent by dismissing the debtor's petition without hearing as alleged punishment for contempt of the lawyer who signed the petition. This simply is not true. The decision of the Court of Appeals states:

> "We have reviewed the record and the Amended Petition carefully and are convinced that the petition is so wanting in sufficient allegations of fact as to Rule 9(b) which requires a pleader averring fraud to state with particularity the circumstances alleged to constitute fraud." (See also pages 11 and 12 of this brief.)

Clearly, the decision of the Court of Appeals is based upon the insufficiency of the pleading. It is true that the Court in its opinion then goes on to review the record and point out that the petition was not filed in good faith and that the petitioner's attorney was guilty of contemptuous or near contemptuous conduct, but it can never be said that the petition was dismissed because of this.

It is interesting to note that also in this court briefs shall be 'free from burdensome, immaterial, and scandalous matter'. Briefs not complying with this may be disregarded and stricken by the court; Rule 40(5). The Court of Appeals did not strike the brief of the petitioner or his petition but rather considered it very carefully, dismissed it as insufficient and then went on to point out that the filing of the petition with the scandalous and reckless charges therein constituted near contemptuous abuse of the processes of the court. Surely this is not contrary to established precedent.

CONCLUSION.

Wherefore, it is respectfully submitted that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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